UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

ROAD & RAIL SERVICES, INC.[1]

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 326, AFL-CIO[2]

Petitioner Case 4–RC–20881

and

SHOPMEN'S LOCAL UNION NO. 502 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, AFL-CIO

Intervenor

DECISION AND ORDER

The Employer, Road & Rail Services, provides specialty logistics services at several locations in the United States. The Intervenor, Iron Workers Local 502, currently represents a unit of "preppers" employed at the Employer's Newark, Delaware facility. The Petitioner, Teamsters Local 326, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent the employees in the unit currently represented by the Intervenor.[3]

The Employer and the Intervenor contend that there is a contract bar that precludes the processing of this petition, based on a contract dated July 8, 2004,[4] which was signed before the

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] After the hearing closed, the parties entered into a written stipulation that the Intervenor and the Petitioner are both labor organizations under Section 2(5) of the Act and agreed to make this stipulation part of the record.
[4] All dates are in 2004 unless otherwise indicated.

petition's filing. The Employer also asserts that there is a recognition bar or a successor bar to the petition.

The Petitioner contends that no contract bar should apply because there are serious questions as to whether the Intervenor signed the collective-bargaining agreement on July 8. The Petitioner further contends that there is no contract bar because the Intervenor's parent body (the International) did not approve the agreement until after the petition had been filed. The Petitioner contends that no recognition bar or successor bar applies in the circumstances of this case.

A hearing officer of the Board held a hearing, and the Employer and the Petitioner filed briefs. I have considered the evidence and the arguments presented by the parties, and as discussed below, I have concluded that there is a contract bar to the petition. Accordingly, I have directed that the petition be dismissed. To provide a context for my decision, I will first present the factors that must be evaluated in resolving the contract bar issue. Then, I will present in detail the facts and reasoning that support my conclusion.

I. FACTORS RELEVANT TO THE APPLICABILITY OF A CONTRACT BAR

The burden of proving that a contract bars the processing of a petition is on the party asserting that there is a bar. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). In order for a collective-bargaining agreement to serve as a bar to an election, the Board's well-established contract bar rules require that the agreement satisfy certain formal and substantive requirements. Specifically, the agreement must be signed by the parties prior to the filing of the petition that it would bar and must contain substantial terms and conditions of employment to which the parties can look for guidance in resolving day-to-day problems. *Cooper Tank and Welding Corp.*, 328 NLRB 759 (1999); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). Thus, for example, an agreement limited to wages and fringe benefits will not constitute a bar to an election. *J.P. Sand and Gravel Company*, 222 NLRB 83 (1976). However, an agreement need not delineate completely every one of its provisions in order to qualify as a bar. *Farrel Rochester Division of USM Corp.*, 256 NLRB 996, 999 fn. 18 (1981).[5] In determining the validity of a contract, the Board limits its inquiry to the four corners of the document asserted as a bar and excludes the consideration of extrinsic evidence or parol evidence. *Waste Management of Maryland, Inc.*, 338 NLRB No. 155 (2003). A requirement for approval by an international union that is not a named party to the contract is not a condition precedent to the functioning of the contract as a bar. *Western Roto Engravers*, 168 NLRB 986 (1967); *Standard Oil Co.*, 119 NLRB 598 (1958). Cf. *Crothall Hospital Services*, 270 NLRB 1420 (1984).[6]

[5] In that case, the Board found an agreement to constitute a bar where the parties agreed in general terms to a union security clause and dues checkoff provision, leaving the language of those provisions to be worked out at a later date.

[6] In that case, the Board found no contract bar where the relevant international union was a named party to the agreement but had not signed the agreement prior to the filing of the petition.

II. BACKGROUND AND FACTS

In late March or early April 2004, the Employer was awarded a five-year contract to perform prepping work for the Norfolk Southern Railroad at its Newark, Delaware facility. Prepping work involves readying railcars to receive automobiles or trucks for shipment. Employees remove debris, ensure that tie down devices for the vehicles are present, and perform minor mechanical repairs to the railcars. The peppers work from 6 a.m. to about 1 p.m. seven days per week.

The prepping work at the Newark location had previously been performed by a company identified as "Caliber."[7] The Intervenor had a collective-bargaining agreement with Caliber covering its Newark employees.

The Employer commenced operations at the Newark facility on June 5. That same day, the Employer and the Intervenor signed a recognition agreement whereby the Employer recognized the Intervenor as the exclusive bargaining representative of the Employer's "maintenance, repair, railcar prepping, and mechanical railcar prepping" employees at the Newark location. The agreement was signed by the Intervenor's President and Business Manager, Donald Wanamaker, and the Employer's then Vice-President for Human Resources, Robert Amrine. Amrine was promoted to a Senior Vice-President position at an uncertain date later in the year. As of June 5, the Employer employed four employees, three of whom had been employees of Caliber.[8] There were five employees in the bargaining unit as of the date of the hearing.

Amrine and Wanamaker held four or five negotiation sessions for a new contract, and on July 8 Amrine signed a 29-page collective-bargaining agreement in Wanamaker's Conshohocken, Pennsylvania office. Amrine testified that he left for another appointment after he signed the agreement, and he did not witness Wanamaker sign it. Wanamaker had told him that he wanted to "conduct further reviews" of the agreement.[9] Wanamaker did not testify at the hearing but his signature on the agreement is dated July 8.[10] General Organizer for the International Robert Schiebli testified that Wanamaker told him that he signed the agreement but he did not indicate on what date they had this discussion or which agreement Wanamaker said he had signed. Schiebli testified that the signature on the July 8 contact was Wanamaker's signature.

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[7] Caliber's full name is not in the record.

[8] At the hearing, the parties stipulated that Area Manager Tom Layman is excluded from the unit.

[9] Amrine testified that he signed at least two agreements on July 8 because he and Wanamaker had made some changes. According to Amrine, those changes related to wages for one of the job classifications, call back time, and the 401k plan. He signed one document as "Vice-President" and the other as "Senior Vice President."

[10] The Hearing Officer requested that Wanamaker be called to testify, but the Employer's counsel suggested that he was unavailable due to unspecified scheduling problems.

The agreement extends from July 8, 2004 to July 7, 2007. It covers terms and conditions of employment such as wages, benefits, working hours, holidays, and vacations and includes a "just cause" provision for discharges and other discipline. It does not contain an employee ratification requirement. The agreement requires that it be approved by the International "as to form" before it becomes binding but does not require that the approval be in writing. The agreement specifically states that the International is not a party to the agreement, and it does not include a signature line for the International.[11]

On July 16, Amrine signed a 27-page collective-bargaining agreement for the Newark facility employees in his office in Louisville. Amrine testified that he signed this agreement because he believed the July 8 version had been lost. While he stated that the only changes made to this agreement from the July 8 agreement were the addition of the line for the International representative's signature and a matter pertaining to wages, the July 16 agreement also contained a retirement plan that was not in the previous agreement.[12] The July 16 agreement also corrects numerous typographical errors from the earlier agreement and has different pagination. Amrine explained that the page numbers differed from the July 8 agreement because a table of contents had been added and the font was changed.[13] Neither the Intervenor nor the International signed this agreement, although the agreement contains signature lines for both of them.

On July 30, 2004, the Employer hired Lyndon Eugene King as a prepper. King had been employed by Caliber from February 2003 to November 2003. The Employer gave King its Associate Handbook, which states, inter alia, that employees are "at-will employees." The Employer did not give him a collective-bargaining agreement. However, King testified that his wage rate for the Employer was between five and 10 cents per hour higher than it had been when he worked for Caliber.

After obtaining authorization cards from employees on August 10 the Petitioner faxed a demand for recognition to the Employer. The Employer did not respond to the demand, and the Petitioner filed the petition in this case the next day.

On August 11, Wanamaker met with all five of the Employer's employees and asked them if they had signed authorization cards for the Petitioner. They told him they had done so. He asked them to sign cards for the Intervenor, but they refused. Wanamaker gave the employees copies of the agreement that was signed by Amrine on July 16.

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[11] Thus, Section 2 of the agreement states, in pertinent part, "The International . . . is not a party to this Agreement and assumes no responsibility or liability under this Agreement and similarly shall have no right of redress thereunder against the company for the breach thereof. However, before this Agreement and any amendments thereto may become binding and effective, the International must approve this Agreement and/or such amendments as to form. Such approval by the International as to the form shall not be construed to make the International a party of this Agreement or any amendment thereto . . ."

[12] Amrine's testimony is unclear as to what changed with respect to wages but a comparison of the two documents reveals that there were no such changes.

[13] A comparison of the July 8 and July 16 contracts shows that they differ in pagination, but they both contain tables of contents.

On August 16, the Petitioner's President and Business Agent, John Ryan, called Wanamaker and asked him if the Intervenor had a collective-bargaining agreement with the Employer for its Newark facility. Wanamaker initially answered that it did not. According to Ryan, an hour later Wanamaker called him back and told him that he had been mistaken, that the Intervenor did have an agreement with the Employer, but that the International had conducted the negotiations for the agreement.

At the hearing, the Petitioner introduced five pages from a purported third agreement between the Intervenor and the Employer for the Newark facility, which it claimed had been sent from the Board's Philadelphia Regional Office by fax on August 24. The agreement was signed by Amrine on July 8 and by Wanamaker on August 16 and was approved by the International on an unspecified date. Since the record contains only a few pages of that agreement, it is not clear whether it contains any changes from the two earlier agreements.

III. ANALYSIS

I find that the Employer and the Intervenor have met their burden to show that the July 8 contract is a bar to the instant petition. The agreement contains substantial terms and conditions of employment. Indeed, it appears to be a complete contract, and the absence of a retirement plan does not render the bar inapplicable. See *Cooper Tanks & Welding Corp.,* supra; *Stur-Dee Health Products,* supra.[14] The agreement on its face is signed and dated by representatives of both the Employer and the Intervenor and therefore meets the requirements set forth in *Appalachian Shale Products*, supra, and subsequent cases for establishing a contract bar. Moreover, it appears that the parties had implemented the agreement prior to the date the petition was filed, as King was hired on July 30 and received higher wages than he had received when he worked under the Intervenor's agreement with Caliber.

The Petitioner's contention that the July 8 agreement should not be deemed a bar because it was not approved by the International prior to the filing of the petition is without merit. Thus, although the record is unclear as to when the International approved the agreement, the Intervenor's timely approval is not a condition precedent to finding a contract bar because the International is not a party to the agreement. See *Standard Oil*, supra; *Western Roto Engravers*, supra.

The Petitioner further contends that suspicious circumstances surrounding the signing of the July 8 agreement preclude the assertion of a contract bar based on that agreement. Indeed, the Petitioner asserts that the contract bar argument "is a collusive fraud." The Petitioner points in particular to the existence of three different agreements, signed on different dates, covering the same unit, and suggests that there would have been no need for subsequent agreements if, in

[14] In addition, if the 401k plan were omitted by error, the bar would still apply. When a contract that meets the contract-bar standards includes an error through mutual mistake, and another document is later drafted and signed with the intention of correcting the error, the earlier contract as reformed constitutes a bar. *Farrel Rochester Division of USM Corp.*, 256 NLRB 996 (1981); *Television Station WVTV*, 250 NLRB 198 (1980).

fact, an agreement were signed by both parties on July 8. The Petitioner further emphasizes that Wanamaker did not testify to establish the date that he signed the agreement. Although it would have been far preferable for Wanamaker to have testified in this case, I find that there is an insufficient basis to show that the parties did not sign the contract on July 8 when the agreement on its face clearly indicates that the parties signed it on that date. Amrine reasonably explained that he signed a second agreement on July 16 because he believed the July 8 agreement had been lost. Although the record does not explain the reasons why there was another agreement signed by Wanamaker on August 16, I do not find, in these circumstances, that the mere presence of two subsequent agreements casts serious doubt as to the date the initial agreement was signed.[15]

The Petitioner also contends that the following circumstances arouse suspicion as to the date the agreement was signed: the fact that Amrine signed two agreements dated July 8, once indicating his title was Vice President and the other indicating it was Senior Vice President; Wanamaker's statement to Ryan on August 16 that the Intervenor did not have an agreement with the Employer and his later statement that the International had negotiated it; and the Employer's distribution of a handbook to King on July 30 that stated that employees were "at-will," despite the fact that the agreement contained a just cause provision. These circumstances, while unusual, do not provide a basis for rendering the July 8 agreement invalid. Accordingly, I find that the July 8 agreement is a bar to the processing of the petition. *Cooper Tank and Welding Corp*., supra;[16] *Appalachian Shale Products*, supra.

The Employer also contends that because the Employer is a successor to Caliber, its recognition of the Intervenor should bar the petition. However, an incumbent union in a successorship situation is entitled only to a rebuttable presumption of continuing majority status, which does not serve as a bar to an otherwise valid decertification, rival union, or employer petition. *MV Transportation*, 337 NLRB 770, 773 (2002).[17] Thus, if there is no contract bar, employees have the right to attempt to secure representation by another union. I also reject the Employer's assertion that the Intervenor's contract with Caliber, the Employer's predecessor, should serve as a bar to this petition. In this connection, the Employer contends that the July 8 agreement was a continuation of Caliber's agreement with only slight modifications. However, since the record does not contain the agreement with Caliber, there is no evidence as to when that contract expired and to what extent the two agreements differed. This contention thus is

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[15] The Petitioner urges that since Wanamaker did not testify, I should apply the "adverse inference rule" and find that he did not sign the agreement on July 8. However, the adverse inference rule does not apply to representation proceedings.

[16] *Roosevelt Memorial Park, Inc*., 187 NLRB 517 (1970), is distinguishable. In that case, the Board did not find a contract bar because it could not establish the date the contract was signed as the contract presented at the hearing was never signed and the testimony as to the date of its execution was vague, ambiguous, and inconsistent. *Air Lacarte, Florida, Inc.*, 212 NLRB 764 (1974) also is distinguishable. In that case, although the relevant collective-bargaining agreement was dated, the individual who stated at the hearing that it was signed on the date indicated on its face was found, based on other evidence, to have committed perjury as to this statement. In the instant case, the evidence does not establish that Wanamaker did not sign the collective-bargaining agreement on the date next to his signature.

[17] In that case, the Board overruled *St. Elizabeth's Manor*, 329 NLRB 341 (1999), in which the Board created a "successor bar."

without evidentiary support. I therefore find that the instant petition is barred solely by the July 8 contract.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner and the Intervenor claim to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. If a hard copy is also mailed to this address, a request for review may also be submitted by E-mail. For details on how to file a request for review by E-mail, see http://gpea.NLRB.gov/. This request must be received by the Board in Washington by 5:00 p.m., EST on **November 29, 2004.**

Signed: November 15, 2004

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four